Supreme Court, U.S.
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No. 92-1174

# In the Supreme Court of the United States

OCTOBER TERM, 1992

JERRY SCHNEIDERMAN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. In October 1990, petitioners were indicted by a grand jury sitting in the Southern District of New York. Five counts charged them with "unlawfully, willfully and knowingly" making use of interstate conveyances as part of a scheme to sell drug paraphernalia, in violation of 21 U.S.C. 857(a)(1). Six counts charged them with "unlawfully, willfully and knowingly" offering drug paraphernalia for sale and transportation in interstate commerce, in violation of

21 U.S.C. 857(a)(2). Two counts charged them with money laundering, in violation of 18 U.S.C. 1956(a) and 1957(a); and one count charged them with conspiring to violate 21 U.S.C. 857 and 18 U.S.C. 1956, in violation of 18 U.S.C. 371. Pet. App. 3a, 6b.

The Mail Order Drug Paraphernalia Control Act, 21 U.S.C. 857, made it unlawful to use the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia, and to offer to sell and transport drug paraphernalia in commerce.[1] The Act defined "drug paraphernalia" to include "items primarily intended or designed for use " with illegal drugs, and listed 15 such items. 21 U.S.C. 857(d). It set forth eight factors to consider in determining what constitutes drug paraphernalia, and it provided for an exemption for items intended for use with tobacco products. 21 U.S.C. 857(f)(2).

On October 29, 1991, the district court held that the Mail Order Drug Paraphernalia Control Act is unconstitutionally vague. Pet. App. 1b-21b. In its opinion, the court contrasted the federal statute to "a valid alternative" (*id.* at 20b), the Model Drug Paraphernalia Act. The court found the federal statute to be a strict liability offense without a scienter requirement, and it found that the average person could not determine whether particular conduct fell within the statute's terms. As a result, the court concluded, the statute's vagueness "allows it to serve as a tool of

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[1] On November 29, 1990, subsequent to the indictment in this case, the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. 857, was repealed and reenacted by the Crime Control Act of 1990, Pub. L. 101-647, Tit. XXIV, § 2401(b), (c), 104 Stat. 4858-4859. It was recodified as 21 U.S.C. 863.

arbitrary enforcement." Pet. App. 18b. The court also dismissed the money laundering counts because they were based on the drug paraphernalia counts. Pet. App. 21b.

The court of appeals reversed. Pet. App. 1a-7a. The court held that the Mail Order Drug Paraphernalia Control Act required scienter and was not unconstitutionally vague. The court found a scienter requirement in the language of subsection 857(d) defining "drug paraphernalia" to include only those items "primarily intended or designed for use" with illegal drugs. The court concluded that the statute was not unconstitutionally vague, because it "clearly prohibits trade in hard-core drug paraphernalia having no alternative use." Pet. App. 6a. Moreover, the court noted that defendants must have the requisite scienter to violate its provisions, and that the statute provides sufficient guidance to law enforcement authorities to prohibit arbitrary or discriminatory enforcement. *Id.* at 7a.

2. Petitioners contend (Pet. 9-23) that the Mail Order Drug Paraphernalia Control Act violates the Due Process Clause because it lacks a scienter requirement, and that the circuits are divided on the question whether the Act requires proof of scienter. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are

affirmed on appeal, they will then be able to present their current claims to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2] It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
*Acting Solicitor General*

JANUARY 1993

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[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.